No. 588.

Supreme Court of the United States

October Term, 1942.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
Petitioner,

vs.

THE WINTERS NATIONAL BANK AND TRUST COMPANY OF DAYTON, OHIO, as Administrator de bonis non with will annexed of the Estate of ROBERT CHAMBERS, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

CASES CITED.

TEXT AUTHORITIES CITED.

STATUTES CITED.

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I. INTRODUCTION.

The undersigned attorneys respectfully submit to this Honorable Court the following brief on behalf of the respondent, The Winters National Bank and Trust Company of Dayton, Ohio, as Administrator d.b.n. w.w.a. of the Estate of Robert Chambers, deceased, and in opposition to the Petition for Writ of Certiorari herein.

By way of explanation of the form and content of the following brief we wish to call the Court's attention to the following aspects of the petitioner's petition and brief:

First: The Summary Statement on page 2 of the petition, as supplemented in the Statement of the Case on page 10 of petitioner's brief contains what we believe to be an incom-

plete and inaccurate statement of the facts in this case, and is devoted largely to a garbled and argumentative statement of the respondent's contentions in the lower Court. Under these circumstances, we feel compelled to include in this brief a statement of the facts in this case.

Second: The petition states six questions which are alleged to be presented in this case, specifies six errors and assigns four reasons for granting the writ. An examination of the petition and its supporting brief shows that there is no very clear relation between the alleged questions and errors on the one hand and the reasons for granting the writ on the other hand; that the assigned reasons do not even attempt to bring this case within the categories set out in Paragraph 38 (5) of the Rules of this Court; and that petitioner has wholly misconceived the function of a supporting brief in that the argument in its brief here is devoted entirely to an effort to demonstrate error on the part of the lower Court, instead of an effort to demonstrate why this Court should review the case. Although it is our understanding that it is not the primary function of a brief in opposition to present or support a statement of the propositions of law upon which the decision of the lower Court is based, we ask this Court's indulgence in doing so in this brief with the conviction that such a statement will show clearly that a majority of the questions alleged by petitioner to be presented in this case are not in fact presented, that there is no merit in the petitioner's argument on any of the alleged questions, and no foundation for the reasons assigned by petitioner for granting the writ.

II. STATEMENT OF THE CASE.

The facts in this case are set out in detail in the Findings of Fact made by the District Court (R. 59, et seq.), and inasmuch as petitioner made no argument in the Circuit

Court that such Findings were erroneous, it may be assumed that petitioner concedes them to be correct. The following summary is taken from these Findings, with appropriate record references to documentary exhibits.

The general subject matter of this case is the question of petitioner's liability as surety upon a bond given by it to secure the performance by Daniel I. Harshman of his duties as Administrator d.b.n. w.w.a. of the Estate of Robert Chambers, deceased, which estate is being administered in the Probate Court of Montgomery County, Ohio. Petitioner became surety on Harshman's official bond on March 19, 1918 (Ex. 6, R. 110). During the course of his administration Harshman filed nine successive accounts in the Probate Court, the ninth having been filed on April 9, 1931, and settled on June 1, 1931. (Ex. 5, R. 110) On May 11, 1937, Harshman admitted that there were discrepancies in his management of the estate. He filed no further accounting of his administration and during the progress of an action for his removal as administrator, he committed suicide.

Having succeeded Harshman as Administrator of the Chambers Estate, respondent secured the appointment of Philip R. Becker as Administrator of Harshman's estate. On July 7, 1937, Becker filed in the Probate Court a tenth and final account of Harshman's administration of the Chambers Estate. (Ex. A-5, R. 115) Thereafter respondent and several beneficiaries of the Chambers Estate filed exceptions to this tenth and final account and to Harshman's eighth and ninth accounts, alleging embezzlement of estate funds and other acts of maladministration on the part of Harshman during the entire period covered by those accounts, and seeking the vacation of the settlement orders on the eighth and ninth accounts on the grounds that they contained errors and the settlement thereof had been procured by fraud on the part of Harshman. (Ex. A-6, R. 141) A copy

of the exceptions was served on petitioner and a time was set for a hearing thereon. Petitioner then filed in the Probate Court a demurrer to the exceptions on the grounds that the exceptions did not state facts sufficient to constitute a cause of action and that the court had no jurisdiction of the subject of the action. (Ex. A-8, R. 154) The demurrer was overruled and petitioner then filed an answer to the exceptions comprising a general denial and an affirmative defense that the proceedings were not brought within the time prescribed by law and were barred by law (Ex. A-12, R. 157), and also exceptions in its own behalf claiming that the tenth account should be amended to provide a compensation allowance for Harshman's services. (Ex. A-11, R. 156) Trial of the issues thus joined resulted in a decision which sustained certain of the exceptions filed on behalf of the beneficiaries and overruled petitioner's exceptions in their entirety. (Ex. A-13, R. 158)

From this decision petitioner prosecuted an appeal to the Common Pleas Court of Montgomery County, Ohio, and a judgment to substantially the same effect was rendered, finding a large amount of money due from Harshman, and directing Becker to file in the Probate Court an amended tenth and final account showing therein the amount so found due from Harshman. (Ex. B-8, R. 195) Petitioner then appealed to the Court of Appeals of Montgomery County, Ohio, and respondent and the beneficiaries filed a cross-appeal. The Court of Appeals affirmed the judgment with certain modifications to make it identical with the judgment originally rendered in the Probate Court (Ex. C-10, R. 336, reported under the name of *In Re Estate of Chambers*, 30 Ohio Law Abs. 420, 16 Ohio Opinions 519, 36 N. E. 2nd 175). Thereafter petitioner attempted to secure a review of the case by the Supreme Court of Ohio both by way of motion to certify and by appeal as of right, but the ap-

peal was dismissed (Ex. C-15, R. 352, reported at 136 O. S. 202) and the motion to certify was overruled (Ex. C-14, R. 351), leaving the judgment of the Common Pleas Court, as modified and affirmed by the Court of Appeals, in full force and effect. Appropriate mandates went down to the Probate Court, and in accordance therewith an amended tenth and final account was filed in the Probate Court. (Ex. A-15, R. 179) Due notice of the filing of this account and a copy thereof was served upon the attorneys for petitioner prior to the filing thereof. In an entry of settlement filed on December 1, 1939, the Probate Court found that said amended account had been filed in conformity with the judgment of the Common Pleas Court, as modified and affirmed by the Court of Appeals; that said account had been properly examined and advertised according to law and the rules of the court; that no exceptions thereto had been filed and the same was true and correct; and that there was due and owing to respondent, as Harshman's successor, the sum of Thirty Thousand Three Hundred Seventy-two and 58/100 Dollars ($30,372.58), with interest on Twenty Thousand Four Hundred Thirty-three Dollars ($20,433.00) thereof at the rate of six per cent (6%) per annum from October 1, 1939, until paid. (Ex-16, R. 192). No appeal was taken from this order of settlement within the time required by law, and the same is now in full force and effect.

On December 11, 1939, respondent demanded payment from the surety and from Philip R. Becker, as Administrator of Harshman's estate, of the sum so found due by the Probate Court, with which demand both of them failed, and still fail, to comply.

On December 21, 1939, petitioner filed its complaint against respondent in the District Court seeking a construction of its surety bond and a determination of its liability thereunder by way of declaratory judgment (R. 1), setting

up such defenses as improper procedure in the preceding state court litigation, lack of jurisdiction of the state courts, statutes of limitation, and laches on the part of the beneficiaries of the Chambers Estate. On December 22, 1939, respondent filed its petition in the Common Pleas Court of Montgomery County, Ohio, against petitioner upon the latter's surety bond alleging a breach in the condition of the bond that Harshman should administer the testator's property according to law and the will of the testator, in that Harshman's administrator had failed to pay to respondent the amount found due from Harshman upon the settlement by the Probate Court of Harshman's amended tenth and final account. (R. 22) This action on the bond was removed by petitioner from said state court to the District Court below. (R. 22, et seq.) Thereafter respondent filed its answer to petitioner's complaint for declaratory judgment, setting up in detail the preceding state court litigation on exceptions and alleging that all matters passed upon by the state courts were *res judicata* insofar as they determined Harshman's liability, and that the entry of settlement of Harshman's amended final account was conclusive and binding upon petitioner. (R. 6, et seq.) Petitioner then filed its answer to respondent's petition on the bond, setting up therein the same defenses to its liability which it had asserted in its complaint for declaratory judgment. (R. 29, et seq.) The District Court then consolidated the two cases for all purposes. (R. 29) A jury having been waived, the entire matter was tried to the Court.

Pursuant to a pre-trial conference, the District Court rendered a decision on certain preliminary questions of law (R. 35), and this decision, overruling all of petitioner's defenses to its liability, substantially disposed of the case. Thereafter the District Court rendered a final decision with Findings of Fact and Conclusions of Law (R. 56), pursuant

to which final judgment was rendered against petitioner on its bond in the same amount which the Probate Court had found due from Harshman upon the settlement of his amended final account. (R. 85) Upon appeal by petitioner to the Circuit Court, the judgment was affirmed. (R. 359)

III. PROPOSITIONS OF LAW SUPPORTING DECISION OF CIRCUIT COURT.

A. The order of the Probate Court of Montgomery County, Ohio, approving and settling the amended tenth and final account of Harshman and determining the amount due from him to respondent as his successor, is conclusive and binding upon petition, and the nature and amount of such liability cannot be again inquired into in this action on petitioner's bond; and this would be true even if petitioner had not been a party to the proceedings on exceptions which preceded the settlement of this amended account and had not had notice of the filing of the same. This is a matter governed solely by local Ohio law and this proposition has been conclusively established by the following Ohio cases:

Braiden v. *Mercer*, 44 O. S. 339, 7 N. E. 155.
Slagle v. *Entrekin*, 44 O. S. 637, 10 N. E. 675.
Smith v. *Rhodes and Wilt*, 68 O. S. 500, 68 N. E. 7.
United States Fidelity and Guaranty Company v. *Wood*, 35 O. App. 224, 172 N. E. 383, motion to certify overruled March 26, 1930.
Smith v. *Worley*, 12 O. App. 367.
Cook, Adm'r., v. *Shanower*, 49 O. App. 227, 197 N. E. 122.

B. The failure of Harshman or his administrator to pay the amount determined by the Probate Court to be due from Harshman upon the settlement of his amended final account constitutes a breach of the bond. The respondent's petition

on the bond alleges a straight cause of action for the recovery of the amount so found due from Harshman. The only condition of the bond alleged is that Harshman should administer the testator's property according to law and the will of the testator, and the only breach of the bond alleged is the failure to pay the amount so found due by the Probate Court. Since this is a matter of local Ohio pleading and practice dealing with an Ohio form of fiduciary bond, it is governed by Ohio Law. On this point the Supreme Court of Ohio in the case of *Slagle* v. *Entrekin*, 44 O. S. 637, 10 N. E. 675, held that the averment of a failure of an administrator, who has resigned, to pay to his successor the amount found due from him in the settlement of his accounts, is a sufficient assignment of breach of the condition in his bond 'to administer according to law' the assets of the estate. It is stipulated in the record (R. 98) that the amount found due from Harshman has not been paid, and in the light of the rule of pleading set out in the Slagle case, it is clear that a breach of the bond has been properly pleaded and proved, so as to entitle the respondent to recovery therefor from petitioner.

C. Entirely apart from Proposition A above, the judgments and orders of the state courts in the proceedings upon exceptions to Harshman's accounts are *res judicata* insofar as they determined the question of the nature and amount of Harshman's liability and the question of the jurisdiction of the state courts to make those orders, and petitioner cannot now be heard to assert in this action on the bond any of the defenses on these questions which it did assert or could have asserted in the proceedings on exceptions. The petitioner appeared in the proceedings on exceptions, filed a demurrer and an answer, defended the case at the trial and appealed three times from adverse deci-

sions. It is now foreclosed under the rules laid down in the following authorities:

23 Ohio Jurisprudence, 961, 969, 976, 985.
Davis v. *Mabee*, 32 F. 2d 502, CCA-6.
Conn v. *Ringer*, 32 F. 2d 639, CCA-6.
Bolles v. *The Toledo Trust Company*, 136 O. S. 517, 27 N. E. 2d 145.
Stoll v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104.
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263.
C. & C. Bridge Co. v. *Sargent*, 27 O. S. 233.
Swenson, et al, v. *Cresop*, 28 O. S. 668.
Mengert v. *Brinkerhoff*, 67 O. S. 472, 66 N. E. 530.
Rothman v. *Engel*, 97 O. S. 77, 119 N. E. 250.
Ostrander-Seymour Co. v. *Grand Rapids Trust Company*, 50 F. 2d 567, CCA-6.

D. The decision of the state Court of Appeals under the rule of *West* v. *American Telephone & Telegraph Company*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, is controlling on the Federal Courts insofar as that decision is applicable to this suit on the bond, entirely apart from propositions A and C above. In view of the fact that the Supreme Court of Ohio declined to review this decision of the state Court of Appeals in the proceedings on exceptions, the decision of this Court in the case of *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284, is particularly pertinent.

IV. ARGUMENT.

In subdivision A of the following Argument, we will discuss the specifications of error argued in petitioner's brief; and in subdivision B we will discuss the questions alleged to be presented and the reasons assigned by petitioner for granting the writ.

A. Argument on Petitioner's Specifications of Error.

Although petitioner specifies six errors in its petition, it has argued only three in its brief, and we will argue them in the order presented in petitioner's brief.

1. Specification of Error No. 1.

Here petitioner says that "the application of the doctrine of *res judicata* has deprived your petitioner of its defenses to litigate on its bond." We interpret this peculiarly worded statement to mean that petitioner claims it has been deprived of an opportunity to present defenses in respondent's suit on the bond; and this interpretation is borne out by the assertion at various places in petitioner's brief that respondent's suit in the District Court was on the judgment rendered in the state court proceedings on exceptions rather than upon the bond. In making this contention petitioner misconceives the relationship between the state court proceedings and the action on the bond. The purpose and result of the proceedings on the exceptions was to determine the nature and amount of Harshman's liability, and the purpose of the present action on the bond is to collect the liability so determined from the petitioner because of its principal's failure to pay that liability. Petitioner attempted to confuse both the District Court and the Circuit Court on this point, but was unsuccessful in each instance. In response to a claim made in the District Court that the suit was on the judgment rather than the bond, the District Court said at R. 52:

> "The action, however, is not on a judgment but, as heretofore stated, on the bond for recovery of the amount found due from Harshman by the Probate Court on the settlement of the amended final account."

The same distinction was noted and observed by the Circuit Court when it said at R. 366:

> "The probate court entered no judgment against the surety and treated the prayer (against the surety) for such relief as surplusage. The judgments of the higher state courts, likewise, covered the liability of Harshman only. The determination of the liability of the administrator, while a prerequisite to this suit on the bond, is no part of the cause of action against the surety itself. The appellee proceeded in exact conformity with Ohio precedent of the highest authority in determining the amount due from Harshman on exceptions to his account and in filing a subsequent suit against the surety to recover the amount thus found due." (Citing Ohio cases)

Bearing in mind this distinction between the purpose and result of the proceedings on exceptions and the purpose of the suit on the bond, it is apparent that petitioner has been deprived of no opportunity, under the doctrine of *res judicata* or otherwise, to present defenses to its liability on the bond. What petitioner fails to recognize, in claiming it has been so deprived, is that the proceedings on exceptions determined Harshman's liability alone, and not the liability of petitioner. The doctrine of *res judicata* was applied by the lower Courts in this action on the bond only to the extent of precluding petitioner from relitigating any matters which had been previously determined with respect to Harshman's liability, and rightly so. The doctrine was not applied to prevent petitioner from asserting any defenses to its liability, as distinguished from that of Harshman. Petitioner invoked the jurisdiction of the federal courts with its complaint for declaratory judgment for the sole purpose of presenting defenses to its liability, and it likewise had ample opportunity to, and did, present its defenses by means of its answer to

respondent's petition on the bond. Having done so, and having had all its defenses passed upon by the lower courts, petitioner ought not now be heard to complain that it has been deprived of any opportunity to be heard.

Under the heading of "Effect on the Surety" on page 16 of its brief, petitioner continues its argument on this point by claiming that it has been deprived of two specific defenses, namely, that the action on the bond is barred by the limitation contained in Section 10506-48 of the General Code of Ohio, and that the petitioner is not liable for interest on any of Harshman's withdrawals until after a demand had been made on it.

With respect to the defense of limitations it may immediately be noted that as a matter of fact this defense was specifically presented to and passed upon by the lower courts. On this point the Circuit Court said at R. 362:

> "Section 10506-47, General Code, the only section to which the limitation of 10506-48 is applicable, provides an additional remedy against a fiduciary who makes 'any personal use of the funds or property belonging to the trust' for recovery of 'any loss occasioned by such use and for such additional amount by way of penalty * * * as may be fixed by the court * * *.' The District Court correctly held that since the appellee did not seek a penalty, Sections 10506-47 and 48 were not applicable. The instant case is governed by Section 11226, General Code, which provides that an action on the official bond of an administrator shall be brought within ten years after the cause accrued. There is no contention that ten years have expired."

With respect to the defense that it is not liable for interest until after a demand had been made on it, petitioner has fallen into error in failing to distinguish between interest which may be charged against the principal and interest

which may be charged against the surety. Beginning on page 18 of its brief, petitioner cites authorities for the proposition that a surety is not liable for interest until after demand on it, and then points out that no demand was made in this case until December, 1939; but that rule does not by any means indicate that a surety is not liable for interest found to be due from its principal. The cases which petitioner has cited all involve either situations where an attempt has been made to charge the surety with interest beyond the penal sum of its bond, or situations where an attempt was made to charge the surety with interest which was not due from its principal. Contrast this with the case at bar where the total recovery sought is about one-sixth of the penal sum of the bond, and where the interest objected to by petitioner was specifically found by the Probate Court to be due from the principal. Petitioner has failed to cite a single case to support its position and therefore is in no position to claim that it has been deprived of a meritorious defense.

As a final answer to petitioner's claims with respect to these two defenses, it may be pointed out that both are in reality defenses to Harshman's liability rather than to petitioner's liability. Hence they can avail petitioner nothing in this action on the bond because, as hereinabove demonstrated, the rule is well settled in Ohio that an order by a probate court settling an administrator's final account and fixing the amount due from him is conclusive and binding upon his surety and the nature and amount of that liability cannot be again inquired into in an action on the surety bond for the recovery of the amount so found due. Likewise both of these defenses to Harshman's liability either were or could have been presented in the proceedings on exceptions, and hence petitioner ought not now be heard to assert them again in this action.

2. Specification of Error No. 2.

Under this specification petitioner sets out federal cases purporting to show that where different proof is required to sustain two actions, a judgment in one is no bar to the other, and then says that the Circuit Court here is in conflict with them because it held petitioner to be bound by the determination by the Probate Court of Harshman's liability. No such conflict is present in this case. This decision by the Circuit Court is based upon the well-established local Ohio rule that a determination by the probate court of the amount due from an administrator on the settlement of his accounts is conclusive and binding upon his surety in an action on the bond. Petitioner well knows this to be the Ohio rule and nowhere in its brief does it make any argument or cite any authorities to the contrary.

It is apparent that petitioner is confusing this rule with the doctrine of *res judicata*. While the two may seem to be closely akin, they are distinguishable for in Ohio the rule is that the surety is bound by the settlement order whether or not it is a party to the proceedings leading up to the settlement order, while *res judicata* can only be applied where the person against whom it is to be asserted was a party to the prior litigation. In this connection it may be noted that in this case petitioner was a party to the proceedings on exceptions which led up to the settlement of Harshman's amended final account. By way of conclusion as to this point, it should be pointed out that it is inconceivable that petitioner was not familiar with this Ohio rule as to the binding effect of a probate court settlement order, for otherwise it would never have appeared and defended the previous litigation with such vigor, but would simply have made its defense in this action on the bond.

3. Specification of Error No. 3.

Although this specification states that the "Circuit Court of Appeals did not follow the rule pronounced in *West* v. *Am. Tel. & Tel. Co.*, 311 U. S. 223", the gist of petitioner's complaint seems to be not so much that the Circuit Court did not follow the rule in the West case, but rather that it followed the wrong case in determining what the Ohio law is. Our position on this matter is that all the issues in this case are strictly local in their nature, and that under the rule announced by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, the statutes and case law of Ohio are controlling in the determination of those issues. As we have heretofore stated, we contend that the lower courts were entirely right in holding the decisions of the state courts in the proceedings on exceptions to be *res judicata* in this action insofar as they fixed Harshman's liability, but even if this were not so, we submit that the decision of the state Court of Appeals in the proceedings on exceptions is controlling in this case. In view of the fact that the Supreme Court of Ohio overruled petitioner's motion to certify the record and dismissed its appeal from that decision, the following statement from the case of *Stoner* v. *New York Life Insurance Company*, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284, is particularly pertinent:

> "We have recently held in cases where jurisdiction rests on diversity of citizenship, federal courts, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, must follow the decision of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently. *West* v. *American Teleph. & Teleg. Co.*, Nos. 44, 45 (311 U. S. 223, ante, 139, 61 S. Ct. 179); *Fidelity Union Trust Co.* v. *Field*, No. 32, 311 U. S. 169, ante,

> 109, 61 S. Ct. 176); *Six Cas. of Cal.* v. *Joint Highway Dist.* No. 267, (311 U. S. 180, ante 114, 61 S. Ct. 186). In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties and the highest court of the state has refused review."

Petitioner's particular complaint in this respect is that in procuring a determination of Harshman's liability, by means of filing exceptions to his former accounts, respondent pursued the wrong procedure and could only have accomplished the vacation of former accounts by a proceeding under Section 11631 of the General Code of Ohio, to which the limitation in Section 11640 of the General Code of Ohio would have been applicable; in short, that the state courts had no jurisdiction to vacate the settlement of the former accounts. The same claim was made to the state Court of Appeals, which disposed of it as follows (R. 327):

> "It is our determination that the exceptors are rightfully invoking their remedy through exceptions to Account No. 10, with requests that Accounts Nos. 8 and 9 be opened up for correction of errors or mistakes and fraud on the part of Harshman, Administrator * * *."

Under the rule of the Stoner and West cases, supra, this flat determination of this issue is controlling in this action, and the Circuit Court correctly so held. But at petitioner's insistence, the Circuit Court went further and examined this claim of lack of jurisdiction to vacate the former settlement order, and found it to be without merit. (R. 363). The Ohio cases relied upon by the Circuit Court fully support its conclusion and need not be set out here. It is sufficient to point out that in petitioner's brief on this point there is, in the words of Mr. Justice Murphy in the Stoner case, supra,

an "absence of convincing evidence that the highest court of the state would decide differently". It is apparent, therefore, that petitioner has no ground for complaint on this score.

B. On petitioner's presentation of Questions and Reasons for Writ.

The first three of the questions alleged by petitioner to be presented in this case all relate to the application of the doctrine of *res judicata* in this case, and they all boil down to a renewal of petitioner's claim that this doctrine has been applied in this case so as to deprive it of an opportunity to present defenses to its liability on its bond. We strongly contend that none of these questions is actually presented in this case. They are present only in petitioner's imagination by reason of the fact that, as we pointed out in our argument on petitioner's first specification of error, petitioner is confused as to the relationship between the proceedings on exceptions and this suit on the bond. The purpose and result of the proceedings on exceptions was to fix Harshman's liability, and the purpose of this action on the bond is to collect that liability from petitioner. The settlement order by the Probate Court fixing Harshman's liability is conclusive on petitioner, and apart from this rule, petitioner is estopped by the doctrine of *res judicata* from relitigating in this action any defenses as to Harshman's liability which were ruled upon by the state courts in the proceedings on exceptions; but this does not by any means preclude petitioner from setting up in this action on the bond any defenses which it may have to its liability, as distinguished from Harshman's liability. That petitioner was not so precluded is proved by the fact that it not only had ample opportunity to, but actually did, present to the lower courts

all defenses to its liability it had available. There is, therefore, no ground for petitioner's claim that it has been deprived of any opportunity to be heard, and hence no such question is actually presented in this case.

The fourth question alleged by petitioner to be presented is merely a statement to the effect that in applying the rule of the West case, the Circuit Court followed the decision of the state Court of Appeals in the proceedings on exceptions rather than other Ohio authorities which petitioner alleges to be decisive of the Ohio law. Inasmuch as petitioner was unable to persuade the Supreme Court of Ohio to review this decision of the state Court of Appeals, there is little reason to believe that the Supreme Court would have decided differently, and hence the Circuit Court in this case was entirely correct in following this decision by the state Court of Appeals.

Petitioner's fifth and sixth questions both appear to be concerned with whether or not respondent properly pleaded and proved a breach of the surety bond, and they claim that there is some conflict on this question between the decisions of the District Court and the Circuit Court on this matter. This point was determined by the District Court in the following quotation from its decision at R. 51:

> "The Bank's action (Cause No. 64) is one on the bond for recovery of the amount found due from Harshman by the Probate Court on the settlement of the amended final account. The only condition of the bond alleged is that Harshman should administer the testator's property according to law and the will of the testator. The only breach of the bond alleged is the failure to pay the amount so found due by the Probate Court. This is a proper pleading. *Slagle* v. *Entrekin*, 44 O. S. 637."

Since it is admitted in the record that both petitioner and Harshman's administrator refused upon demand to pay the amount so found due, it is obvious that a breach of the bond has been properly pleaded and proved, so as to entitle respondent to a recovery of that amount. The Circuit Court affirmed this decision by the District Court, and we are unable to find any foundation for petitioner's statement that the Circuit Court held that pleading and proof of a breach of the bond was unnecessary or had not been properly done. In any event petitioner has known from the commencement of this litigation that respondent's theory of breach of the bond would be that set out by the District Court above, but it has never, and does not in its present brief, set out any argument or authority to show that such pleading or proof are insufficient to support a judgment against it.

As we pointed out in our introductory remarks in this brief, the reasons assigned by petitioner for granting this writ bear no relation whatsoever to the reasons which this Court has indicated in its Rules will incline it to review a case. All four of petitioner's reasons go back to its claim that it has been deprived of an opportunity to present defenses. We have hereinabove shown in detail that there is no merit in this claim, and it is sufficient at this time to point out that petitioner devoted the period from July, 1937, to December, 1939, to a vain effort in every available court in the State of Ohio to defend and defeat Harshman's liability to the Chambers Estate, and the period from December, 1939, to the present to what has been to date a vain effort in every available Federal court to defeat its own liability. On the face of such a record, we cannot understand how petitioner can now come into this Court and say in good conscience that this Court should review this case so that petitioner may be granted its day in court.

V. CONCLUSION

On behalf of respondent we respectfully submit that this Court should deny a writ of certiorari herein for the following reasons:

A. A majority of the questions which petitioner alleges to be presented are not in fact presented in this case, and on those questions which are presented petitioner has wholly failed to show error on the part of the lower Court.

B. The reasons assigned by the petitioner for the granting of this writ not only fail to bring the case within the pertinent rules of the Court, but are in fact without any legal merit or foundation of fact in the record.

C. The entire subject matter of this litigation is strictly local in nature for the last analysis it involves simply the question of how to determine the liability for maladministration by a fiduciary under the control of an Ohio probate court, and the question of how to enforce such liability against the surety on an official Ohio form of administrator's bond. The determination of these questions is governed entirely by pertinent provisions of the Ohio Probate Code and by pertinent decisions of Ohio courts; and the lower Courts in this action have correctly applied the pertinent Ohio statutes and decisions in arriving at the judgment which petitioner now seeks to have reviewed by this Court. The refusal of the Supreme Court of Ohio to review this case in the proceedings on exceptions would seem to be a very nearly conclusive reason why this Court should not review this case insofar as it presents the same questions presented to that Court.

Having carried this case through nearly six years of expensive and vexatious litigation in four state courts and two federal courts in a vain effort to defeat its promise to stand good for the defaults of its principal, it seems to us that

petitioner, in seeking a further review of these purely local matters by this Court, comes very close to abusing the right to seek such review.

Respectfully submitted,

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